In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-531

LESTER CLIFFORD LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on two counts which charged him, as a person previously convicted of a crime punishable by imprisonment for more than one year, with having transported a firearm in interstate commerce, in violation of former 15 U.S.C. (1964 ed.) 902(e), and with having possessed and concealed counterfeit money with intent to defraud, in violation of 18 U.S.C. 472. He was sentenced to concurrent prison

terms of five years. The court of appeals initially wrote an opinion in which it found no reversible error in the trial, but remanded the case to the district court for a hearing on the reliability of an informant whose information furnished the basis for petitioner's arrest, and for the further purpose of ruling on a motion for new trial on grounds of newly discovered evidence made during the pendency of the appeal (Pet. App. 1a-10a; 428 F. 2d 917). On the remand, the district judge conducted an evidentiary hearing on the reliability of the informant and found that the federal agents had ample basis to believe his information was accurate (Pet. 11a-14a).

The judge also denied petitioner's motion for a new trial, which was based on an allegation that his telephone had been tapped (Pet. App. 14a-15a). At the hearing, petition introduced the testimony of two individuals to the effect that one Spires, a telephone worker, had told them that he had tapped the phone of one "Lee" who, he had been informed, had been arrested as a result. Spires refused to testify, invoking the Fifth Amendment privilege against compulsory self-incrimination. Petitioner did not call as witnesses any of the persons for whom the alleged tap had been undertaken although they were "supposedly known and were not shown to be unavailable" (Pet. App. 16a). On appeal after the remand, the court of appeals affirmed *per curiam* (Pet. App. 15a-16a).

Petitioner's various contentions are fully answered in the opinion below on which we rely.[1] The court of

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[1] As to the severance point (Pet. 10-13), founded in part on petitioner's assertion that he desired to testify only on one of

appeals properly found the claim of wiretapping to be supported only by "unsubstantial and fragmentary evidence which scarcely connected the wiretap (if one occurred) to this defendant" (Pet. 16a). In addition, we have caused an independent check to be made which indicates that no conversations of petitioner were overheard by the federal government by electronic surveillance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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the two counts, see in addition to the cases cited at Pet. 5a-6a, *Baker* v. *United States*, 401 F. 2d 958, 976-978 (C.A. D.C.), affirmed after remand, 430 F. 2d 499, certiorari denied, 400 U.S. 965.

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